



Tenza Trading Ltd.
Ioanni Stylianou 6
2nd Floor, Flat 202
Nicosia, Cyprus 2002
Complainant

v.

Calista Enterprises Ltd.
Global Gateway 1749
Rue de la Perle, Providence
Mahe Island, Seychelles
Respondent

Domain Names in Dispute:

largeporntube.com; goldporntube.com;
kissporntube.com; boxporntube.com;
pipeporntube.com; 69porntube.com;
royalporntube.com; bookporntube.com;
cubeporntube.com; freshporntube.com;
lustporntube.com; bonusporntube.com;
directporntube.com

File Number:

FA1303001491515

RESPONSE

[1.] Respondent received a Written Notice of Complaint and Commencement of Administrative Proceeding on April 12, 2013. The Notification stated that Complainant had submitted a Complaint for decision in accordance with the Uniform Domain Name Dispute Resolution Policy, adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) on August 26, 1999 and approved by ICANN on October 24, 1999 (“UDRP” or “Policy”), and the Rules for Uniform Domain Name Dispute Resolution Policy (“Rules”), effective March 1, 2010, and the National Arbitration Forum (FORUM) Supplemental Rules (“Supp. Rules”), effective July 1, 2010. Rule 4.

[2.] RESPONDENT INFORMATION

[a.] Name: Calista Enterprises Ltd.
[b.] Address: Global Gateway 1749
Rue de la Perle, Providence
Mahe Island, Seychelles
[c.] Telephone: +420.774806357
[d.] Fax: 617-928-1802
[e.] E-Mail: webmaster@alexz-traffic.com

[3.] RESPONDENT’S AUTHORIZED REPRESENTATIVES

[a.] Name: Matthew Shayefar, Valentin Gurvits
Boston Law Group, PC
[b.] Address: 825 Beacon Street, Suite 20

Newton Centre, MA 02459
[c.] Telephone: 617-928-1806, 617-928-1804
[d.] Fax: 617-928-1802
[e.] E-Mail: matt@bostonlawgroup.com, vгурvits@bostonlawgroup.com

UDRP Rule 5(b)(ii).

Respondent's preferred contact person for correspondence relating to this case:

[a.] Contact Name(s): Matthew Shayefar, Valentin Gurvits,
[b.] Contact Emails(s): matt@bostonlawgroup.com,
vгурvits@bostonlawgroup.com

Rule 5(b)(iii).

Respondent chooses to have this dispute heard before a **three-member** administrative panel. Rule 5(b)(iv). The Respondent provides the following three candidates to serve as the panelists:

1. Richard Hill, Hill & Associates, info@hill-a.ch, +41-22-840-1021
2. Petter Rindforth, Fenix Legal KB, info@fenixlegal.eu, +46-8-463-5016
3. Paul DeCicco, Law Offices of Paul Michael DeCicco, info@pmdlaw.com, +1-619-595-0500

[3.] **RESPONSE TO FACTUAL AND LEGAL ALLEGATIONS MADE IN COMPLAINT**

This Response specifically responds to the statements and allegations contained in the Complaint and includes any and all bases for the Respondent to retain registration and use of the disputed domain names. Rule 5(b)(i).

A. The Complainant Has No Rights in the Terms “porn tube” or “porntube”

Although the Complainant cites its registration of the PORNTUBE trademark (the “Putative Mark”) as “prima facie evidence that the mark is distinctive and capable of source identification,” the evidence suggest otherwise – and as discussed in more detail below, the Putative Mark is presently subject to a cancellation proceedings with the United States Patent and Trademark Office before the Trademark Trial and Appeal Board. Respondent and thousands of others in the adult entertainment industry, the mainstream media and the community of Internet users use the terms “porn tube” and “porntube” as generic and/or descriptive designations for websites that offer streaming adult-themed video content. On the basis of the generic and/or descriptive nature of these terms, Complainant has filed a petition for cancellation of the Complainant's registration in the Putative Mark with the United States Patent and Trademark Office. See Annex 1, Petition for Cancellation, *Calista Enterprises, Ltd. v. Tenza Trading Ltd.*, cancellation proceeding no. 92057048 (TTAB Apr. 10, 2013).

The word “porn” is a common shortened form of the word “pornography” and it either names or merely describes the adult entertainment services recited in Complainant’s registration for the Putative Mark. The word “tube” historically served as an informal or slang term for “television” and, since the explosion in popularity of the website YouTube.com in 2005, it has come into widespread and common use to refer to streaming video websites on the Internet. See Annex 2, Google Trends results as between the terms “tube” and “youtube.” Complainant’s combination of the words “porn” and “tube” into the designation “porntube” or “porn tube” is therefore insufficient to render that term capable of source-identifying significance. See *In re ING Direct Bancorp*, 100 USPQ2d 1681 (TTAB 2011) (“Applicant’s deletion of spaces or hyphens within the designation ‘Person2Person’ cannot transform clearly generic terms such as ‘Person 2 Person Payment’ or ‘Person-2-Person Payment’ into something that is capable of functioning as a source identifier.” (citing *In re 3com Corp.*, 56 USPQ2d 1060, 1061 (TTAB 2000))).

As a result of the descriptive and popular nature of the words “porn” and “tube,” the terms “porn tube” and “porntube” have come into widespread and common usage to name and to describe websites such as those operated by Respondent and Complainant. A Google Search for the words “porn tube” returns approximately 801 million results, and the first result is not the Complainant’s website, but a website called YouJizz.com (which is wholly unaffiliated with the Complainant). See Annex 3, Google Search results for the term “porn tube.” However, the Google Search returns thousands of other websites which either describe themselves or are described as “porn tubes.” The results are almost identical on a search for the term “porntube.” See Annex 4, Google Search results for the term “porntube.”

An analysis of the most popular adult tube websites on the Internet also reveals the generic and descriptive nature of the term “porn tube.” There are 32 porn tubes in Alexa.com’s top 1,000 websites on the Internet.¹ Of those websites, approximately 65% of them describe themselves as a porn tube, and 44% of them show up in the first three pages of the Google Search results for the term “porn tube.” See Annex 5, Analysis of Alexa.com’s Top 1,000 websites.

However, not only do Internet website developers and users use the term as a descriptor for adult video websites, but the term is also used descriptively by journalists, courts and the medical and scientific communities. See, e.g., “Are Porn Tube Sites Causing Erectile Dysfunction?,” *Psychology Today*, January 16, 2013; “Copyright Infringements in the Porn Industry,” *The New York Times*, Kal Raustiala and Chris Sprigman, May 5, 2010; “The King of Porn Gossip,” Gawker, September 28, 2012; *Liberty Media Holdings, LLC v. Vinigay.com*, 2011 WL 7430062 (D. Ariz. Dec. 28, 2011) *report and recommendation adopted*, 2012 WL 641579 (D. Ariz. Feb. 28, 2012); The Challenge of User-Generated Porn,” *Forbes.com*, August 8, 2009; Porn Tubes Fight SOPA,” *The Daily Texan*, January 24, 2012; “The Geek-Kings of Smut,” *New York Magazine*, February 7, 2011. Excerpts from each of these sources are included in Annex 1, Petition for Cancellation.

¹ Alexa.com is a well-known traffic ranking site also used as evidence by the Complainant. The ranking for the top 1,000 websites can be found at the URL <http://www.alexa.com/topsites> by clicking “Free Download – Top 1,000,000 Sites (Updated Daily)” link on the top right. Respondent’s analysis in Annex 5 is based on data collected from the rankings compiled on April 10, 2013.

Although Complainant references one instance in which the adult publication XBIZ.com used the term “adult tube” instead of “porn tube,” Complainant has cherry picked its example from among the multitude of examples to the contrary. XBIZ.com regularly uses the term “porn tube” to describe adult video websites unrelated to Complainant. See Annex 6, Excerpts from XBIZ.com. Moreover, Complainant’s contention that “adult tube” is an alternative and equally strong descriptive term is both irrelevant and wrong. Internet consumers rarely search for “adult” in place of “porn.” See Annex 7, Google Trends results as between “porn” and “adult,” and Annex 8, Google Trends results as between “porn tube” and “adult tube.”

Finally, it should be noted that although the Complainant claimed that its registration with the United States Patent and Trademark Office “was received without any objections,” Complaint p. 4, in order to receive such registration, the Complainant first had to enter into a consent agreement with a third party that had registered the mark PORNOTUBE, then submit evidence of such agreement in order to overcome an examiner’s refusal to register the Putative Mark. See Annex 9, Response to Office Action. This false claim by the Complainant is clear evidence of bad faith and Complainant’s misleading statements in its Complaint and in this dispute in general.

On the basis of the foregoing, the Complainant has no cognizable rights to the terms “porntube” or “porn tube” because such terms are generic and/or descriptive. Therefore, Policy ¶4(a)(i) is not satisfied and the Complainant’s requested remedy should be denied.

B. The Respondent’s Domains Are Not Confusingly Similar to the Complainant’s Domains

Even assuming *arguendo* that Complainant could have and does have rights in the term PORNTUBE as a source identifier, Respondent’s use of the term “porn tube” in the domains at issue in this proceeding (the “Disputed Domains”), as well as any websites located thereon, is not confusingly similar to the Putative Mark and does not present a likelihood of confusion.

The Disputed Domains are in and of themselves not confusingly similar to the Putative Mark because users know it is impossible to distinguish within a URL the descriptive/generic terms “porn tube” from the Putative Mark. First, it is commonly known that a domain name cannot contain a blank space. Domains also do not recognize changes in case or capitalization. Nor do domains allow for presentation in different colors or with other stylizations or logos, of course. Therefore, it would be impossible to represent the generic and descriptive concept of a “porn tube” in a domain name as two separate words in the same URL.²

In any case, the Respondent’s websites available at the Disputed Domains each clearly distinguish themselves from the Putative Mark and from the Complainant. See *Gorstew Limited v. Twinsburg Travel*, FA94944 (Nat. Arb. Forum July 7, 2000) (examining the website as part of the confusion analysis); *SportSoft Golf, Inc. v. Hale Irwin’s Golfer’s Passport*, FA94956 (Nat. Arb. Forum July 11, 2000) (same); *Weber-Stephen Products Co. v. Armitage Hardware*, D2000-0187 (WIPO May 11, 2000) (same); *MathForum.com, LLC v. Huang*, D2000-0743 (WIPO Aug. 17, 2000) (same).

² Though it is possible to place a hyphen in a domain name address, Respondent contends that this would make the address a single word and would make Respondent’s domains more likely to be confused with Complainant’s putative trademark in “porntube.”

Each of the Respondent's websites uses the two-word form of "porn tube" and not the Complainant's putative trademark PORNTUBE. On each website, the two words are distinguished from each other by a combination of a space, a differentiation of color, or capitalization. See Annex 10, screen captures of titles and headers of the Respondent's websites. For example, the largeporntube.com title is presented as "Large Porn Tube" and its logo is three clearly separate words reading "<LARGE> porn tube." The boxporntube.com title is presented as "Box Porn Tube" and its logo is presented as three different words, with "box" colored in gold, "porn" colored in white, and "tube" colored in red. The freshporntube.com title is presented as "Fresh Porn Tube" and its logo is the words "fresh porn" in two different colors and "Tube" separately displayed on the screen of an image of a television.

Moreover, the addition of a suggestive, arbitrary or fanciful word prior to each instance of "porn tube" further distinguishes the Disputed Domains and websites from the Putative Mark. For instance, an Internet user who visits the directporntube.com website may expect that he will be visiting a website that delivers porn directly to him and an Internet user who visits the royalporntube.com website may expect that he will be visiting a porn tube that is more regal than others. In no case is it reasonable to believe that a user is expecting to reach one of the Complainant's websites. See, e.g., *Lockheed Martin Corp. v. Parisi*, D2000-1015 (WIPO Jan. 26, 2001) ("Both common sense and a reading of the plain language of the Policy support the view that a domain name combining a trademark with . . . language clearly indicating that the domain name is not affiliated with the trademark owner cannot be considered confusingly similar to the trademark."). This fact is bolstered by the results for a Google Search for any of the names of any of the Respondent's websites. Not a single instance of the Complainant's website is returned on the first page of any of the results. See Annex 11, Google Search results for the name of each Disputed Domain.

Finally, the Complainant, in its consent agreement with the owner of the trademark PORNOTUBE, agreed that due to the "sophistication of the users in the marketplace, namely online users" there would be no confusion between the marks PORNTUBE and PORNOTUBE. Annex 9. It is hard to understand then how the Complainant can argue that users would not be confused between PORNTUBE and PORNOTUBE but that they would be confused between PORNTUBE and FRESH PORN TUBE, for example. In the consent agreement, the Complainant stated that although the Complainant and the registrant of the PORNOTUBE mark had been continuously using their respective marks simultaneously in the marketplace for over four years there had not been one documented instance of public confusion or mistake of origin. Not surprisingly, there have also been zero documented instances of public confusion or mistake of origin between the Complainant's website and the Respondent's websites as well.

The above-referenced facts clearly distinguish the Disputed Domains and their associated websites from the Putative Mark and the Complainant. Any reasonable user would know that the Respondent is not the Complainant and would not be confused. See *Wal-Mart Stores, Inc. v. wallmartcanadasucks.com*, D2000-1104 (WIPO Nov. 23, 2000) (accused domain name was not confusingly similar because reasonable user would not believe the domain name was sponsored by the complainant).

Therefore, given the fact that Respondent's suggestive domain names and websites are distinguished from the Putative Mark and the Complainant to the greatest extent possible by the

Uniform Resource Locator system and the fact that users do not consider either “porn tube” or “porn tube” to be source-identifying in any case, the Disputed Domains and their associated websites are neither identical nor confusingly similar to the Putative Mark. Therefore, UDRP Policy 4(a)(i) and 4(a)(iii) are not satisfied and the Complainant’s requested remedy should be denied.

C. Prior to Notification of the Dispute, the Respondent’s Websites Offered *Bona Fide* Services

The Respondent operates a number of porn tubes and other websites which drive traffic to third party porn tubes. Since at least March of 2007, the Respondent has operated each of these websites through its service known as “AlexZ Traffic” and the web portal alexz-traffic.com. See Annex 12, WhoIs record for AlexZ-Traffic.com, and Annex 13, Screen Capture of AlexZ-Traffic.com. As part of this business, the Respondent operates the websites available at the Disputed Domains, which drive traffic to the Complainant’s and other websites on the Internet. The redirection of traffic is a *bona fide* service offered by the Respondent on its websites and the Respondent has undisputedly been providing these services prior to the time this dispute arose.³

The Disputed Domains and their websites have been operating in this manner since at least as early as June 2009, when the domain freshporntube.com was registered. This was one full year before the Complainant’s Community Trade Mark registration was issued and nearly two years before the Complainant’s U.S. trademark registration was issued. By Complainant’s own admission, the Respondent was operating at least 8 of the disputed domains prior to joining the Complainant’s affiliate program (as described below). Complaint, p. 7. The Respondent thus has been using the “porn tube” term in connection with offering *bona fide* services for nearly four years prior to the filing of the Complaint, which was the first the Respondent was notified of any dispute between it and the Complainant.

The Complainant’s argument that the Respondent’s websites do not offer *bona fide* services is demonstrably false based on the Complainant’s own allegations. The Complainant has developed, operated and fostered an affiliate marketing program to drive traffic from third parties like the Respondent to its own website. As per the Complaint, the Complainant pays approximately \$80,000 per month to parties, including the Respondent, to drive about 48 million visitors per month to its own website. Complaint, p. 8. The traffic from the affiliate program accounts for 80% of all the traffic to the Complainant’s website. *Id.*⁴ The 80% of traffic for which the Complainant pays affiliates like the Respondent is likely an important and sought-after part of the Complainant’s business, and presumably accounts for about 80% of the millions of dollars in sales that the Complainant alleges it grosses each year.

³ It is undisputed that the Respondent registered and began operating its websites far prior to the filing of the Complaint. To the extent that the Respondent may argue that the dispute arose at any time prior to the filing of the Complaint, Section F hereof demonstrates that Respondent knew of, approved of and even rewarded the Respondent’s use of the disputed domain names and the websites available thereon. Prior to the filing of the Complaint, Respondent was not aware of any dispute between it and the Complainant.

⁴ The Complainant asserts that the Complainant’s affiliate program resulted in 47.9 million visitors in one month and that Complainant receives a total of approximately 60 million visitors a month from all sources combined. Complaint, p. 8.

The Complainant has created its affiliate program to drive traffic to its website, and the Complainant pours approximately \$1million a year into this program. By all accounts, Complainant's own business is totally dependent upon parties like the Respondent driving traffic to the Complainant's website. However, despite all of this, the Complainant would have the panel believe that the very business relationship it has created, encouraged and now depends on is not a *bona fide* service.

Specifically, the Complainant would have the arbitrator believe that the Respondent was engaging in a bad faith business practice when, at the Complainant's explicit invitation and encouragement, the Respondent joined the Complainant's affiliate program and began driving millions of visitors to the Complainant's website. The Complainant's argument borders on absurdity when it alleges bad faith on behalf of the Respondent when the Respondent was responsible for approximately 8.25% of the Complainant's affiliate traffic⁵ and when the Complainant paid the Respondent more than \$130,000 in direct compensation for this service.

What is even more absurd is that the Complainant alleges that, despite paying the Respondent substantial amounts of money and despite its dependence on the Respondent as a significant source of its user base, the Complainant was unaware of the Respondent's activities. This allegation is *prima facie* false. As demonstrated in Section F below, it is unquestionable that for years the Complainant was clearly aware of the Respondent, the Respondent's websites and the Disputed Domains, yet still induced and encouraged the Respondent to continue its practice of driving traffic (and even explicitly awarded the Respondent for its actions).

Finally, the Complainant has presented documents showing that the Respondent directed traffic to another website called 4tube.com as evidence of bad faith, claiming that the Respondent is directing traffic to a "competitor's website." Complaint, p. 6. Again, because the Complainant has no rights in the descriptive and/or generic term "porn tube," the Respondent is not engaging in bad faith when the Respondent forwards users to other porn tube websites on the Internet. However, one also must ask how it was that the Complainant was able to acquire the proprietary and confidential traffic logs for the 4tube.com website.

In fact, 4tube.com is either owned or operated by the same individuals who own and operate the Complainant's porntube.com website. See Annex 14, showing the same ICQ contact number 59661018 for porntube.com and 4tube.com. Annex 15 copies chat logs wherein the Complainant states that "we recently acquired www.porntube.com." The chat logs also demonstrate that the Complainant asked the Respondent to join the Complainant's affiliate program⁶ and individually set up an account for the Respondent on the Complainant's affiliate program.⁷ Moreover, the Complainant specifically singles out one of the Respondent's websites as one of its top referrers.⁸ By introducing the allegations regarding 4tube.com, the Complainant

⁵ The Complainant has presented evidence that it has paid the Respondent \$132,140 in a period of approximately 20 months, averaging to approximately \$6,607 per month. Complaint, p. 8. The Complainant has also presented evidence that the Complainant pays all its affiliates a total of approximately \$80,000 each month. Complaint, p. 8. \$6,607 is approximately 8.25% of \$80,000. It is therefore presumed that the Respondent drove approximately 8.25% of all affiliate traffic to the Complainant during this 20 month period.

⁶ "i wanted to take 5min and introduce you to our pay per click program from 4tube" – "Croc and many other webmasters are making some really nice money with it" – "and I think it would work nice with your network also." Chat logs from 16:31:23 2/9/2009, Annex 15.

⁷ Chat logs from 16:40:27 2/09/2009, Annex 15.

⁸ Chat logs from 16:02:23 15/06/2010, Annex 15.

has not only shown its own bad faith but has further proven the *bona fide* nature of the Respondent's websites and business.

Moreover, even if the Respondent's websites do direct users to third party porn tubes not operated by either the Complainant or the Respondent, this does not demonstrate an illegitimate service, given the fact that the Respondent's websites do not purport to be associated solely with the Complainant. As discussed above, the Respondent operates websites which make use of the generic and descriptive nature of the "porn tube" term and users of the Respondent's websites use these websites with the intent to access a variety of porn tubes other than the Complainant's website.

Given the fact that the Complainant has knowingly and purposefully created, fostered and funded the affiliate program which helps operate the Respondent's websites, it is obvious that the Respondent operates websites offering *bona fide* services. See *Hewlett Packard Co. v. Napier*, FA94368 (Nat. Arb. Forum Apr. 28, 2000) (finding a *bona fide* service and no bad faith where complainant was aware of the existence of respondent's website, cooperated with respondent in its development and use, acquiesced to respondent's registration and use, and respondent's website added value to complainant's products). The Complainant's arguments to the contrary are contradictory and are themselves in bad faith.

Because the Respondent used the Disputed Domains and their associated websites in connection with a *bona fide* offering of services, the Respondent has demonstrable rights to and legitimate interests in the Disputed Domains in accordance with Policy ¶4(c)(i). Therefore, Policy ¶4(a)(ii) and ¶4(a)(iii) are not satisfied and the Complainant's requested remedy should be denied.

D. The Respondent is Commonly Known by Its Domain Names

The Respondent and its websites are commonly known by the Disputed Domains and the "porn tube" term, even if Respondent has not acquired trademark or service mark rights in the domain names or the "porn tube" term.

Two of the Respondent's Disputed Domains appear on the first page of results for a Google Search of the terms "porn tube." See Annex 3. For every Google Search of "* porn tube," where the * is replaced with the respective first term of each of the Disputed Domains, the Disputed Domain is the first in the search results. See Annex 11. In not a single search does the Complainant's website appear on the first page of any of the results of these Google Searches.

Moreover, and more tellingly, some of the Respondent's websites are more popular than the Complainant's website at porntube.com. According to Google Analytics, the Respondent's website at largeporntube.com received approximately 60.5 million visitors in March 2013. See Annex 16, Google Analytics for largeporntube.com. According to the Complainant, the Complainant receives only approximately 60 million visitors each month at porntube.com. Complaint, p. 8.

The Alexa rankings show even worse results for the Complainant. On April 10, 2013, Alexa gave largeporntube.com a Global Rank of 459 on its list of most popular websites on the Internet. Annex 5. On that same day, porntube.com had a Global Ranking of 676. *Id.*

Respondent's largeporntube.com website continues to be vastly more popular than the Complainant's porntube.com website through the instant filing date.

In several places, the Complainant references the case of *Google Inc. v. Privacy Protect.cn*, FA1480881 (Nat. Arb. Forum Feb. 25, 2013), for the proposition that the Respondent cannot obtain rights in the Disputed Domains because it used a privacy registration service. However, this argument is unavailing for a number of reasons. First, the *Google* case involved a respondent who never responded to the complaint and therefore it should be cautiously followed. Second, if use of a privacy registration in itself can act as evidence of bad faith, the panel explicitly stated that the presumption is rebuttable. See also *HSBC Finance Corp. v. Clear Blue Sky Inc.*, D2007-0062 (WIPO June 4, 2007) ("The Panel does not consider the Respondent's use of a privacy service in and of itself to constitute bad faith under the Policy . . ."). As another panel has held, "'Domain privacy' is an understandable objective" and a desire for privacy should not be held against the Respondent unless there is evidence of evasive conduct. *Fifth Third Bancorp v. Secure WhoIs Information Service*, D2006-0696 (WIPO Sept. 14, 2006).

There is absolutely no evidence of evasive conduct here. First, the Respondent's name and contact information is easily available for every one of the websites associated with the Disputed Domains. The footer of every single one of the websites states "© 2009-2012 AlexZ-Traffic.com"⁹ and links to a page listing the Respondent's contact information. See Annex 17, Footers of Respondent's Websites. Consumers who visit each of the Respondent's websites know that the Respondent is the owner and operator of the website and know how to contact the Respondent directly. In any case, the Respondent provided complete and accurate contact information to the privacy service, which is now displayed in the WhoIs listing and through which the Complainant has implemented the current proceedings. The fact that the Respondent used a privacy registration service as an intermediary on the WhoIs listing, a listing which very few if any actual consumers will ever view, is irrelevant, and any presumption arising therefrom is rebutted.

Ironically, the Complainant's argument for lack of rights based on the Respondent's use of a privacy service demonstrates the Complainant's own lack of rights and bad faith. The Complainant itself uses a WhoIs domain privacy service for its domain name. See Annex 18, WhoIs record for porntube.com. If Complainant believes its own argument regarding privacy services, then Complainant would not have any rights in its own domain name either. Therefore, either its argument regarding privacy services is in bad faith or its initiation of this entire proceeding is in bad faith.

Because the Respondent has been commonly known by the names of the websites associated with the Disputed Domains, even if it has not acquired trademark or service mark rights therein, the Respondent has demonstrable rights to and legitimate interests in the Disputed Domains in accordance with Policy 4(c)(ii). Therefore, Policy 4(a)(ii) is not satisfied and the Complainant's requested remedy should be denied.

⁹ AlexZ-Traffic.com is the name through which the Respondent owns and operates the websites associated the Disputed Domains. The domain name AlexZ-Traffic.com is registered to the Respondent without any privacy service. Annex 12.

E. The Respondent Did Not Register or Use the Disputed Domains in Bad Faith

There is absolutely no basis for the Complainant's allegations that the Respondent registered and used the Disputed Domains in bad faith. As explained below and on the basis of the facts above, to the extent that the Complainant has alleged bad faith under Policy ¶¶4(b)(iii) and (iv), the allegations fail.¹⁰ Therefore, Policy 4(a)(iii) is not satisfied and the Complainant's requested remedy should be denied.

Although Complainant alleges that, in accordance with Policy 4(b)(iii), the Respondent has registered the Disputed Domains primarily for the purpose of disrupting the Complainant's business, the facts show the complete opposite. As explained above, the Respondent does not operate porn tubes in competition with the Complainant – it operates porn tube aggregators that in turn drive traffic to actual porn tubes like the Complainant's. Therefore, as a threshold matter, the Respondent is not a direct competitor of the Complainant and there is no bad faith under Policy ¶4(b)(iii).

Moreover, given the generic and descriptive nature of the term “porn tube” as detailed above in Section B, the Complainant's argument that the Respondent had “actual knowledge” of the Putative Mark is unavailing. Each of the cases cited by the Complainant on page 10 of its Complaint is based on a long-standing and unopposed trademark like YAHOO! and KMART. The strength and popularity of the Complainant's Putative Mark is miniscule as compared to the referenced cases. Under the questionable legitimacy of the Complainant's rights in the Putative Mark, it would strain credulity to infer “bad faith” because the Respondent knew that the Complainant was using a generic or merely descriptive term as a trademark. For this reason, the Complainant's allegations of bad faith under Policy ¶4(b)(iii) fails as well.

With regards to Policy ¶4(b)(iv), although it is true that the Respondent is commercially benefitting from the relationship between it and the Complainant, the Respondent is not benefitting as a result of any consumer confusion. As detailed in Sections A and B above, the Complainant has no exclusive rights and can have no exclusive rights in the term “porn tube” and, in any case, there is no confusion between the Complainant and the Respondent or their services and websites. Therefore, Policy ¶4(b)(iv) does not apply either.

Therefore, the Complainant's reliance on *MathForum.com, LLC v. Huang*, D2000-0743 (WIPO Aug. 17, 2000), *Kmart v. Kahn*, FA 127708 (Nat. Arb. Forum Nov. 22, 2002), *State Fair of Texas v. Granbury.com*, FA 95288 (Nat. Arb. Forum Sept. 12 2000), and *Drs. Foster & Smith, Inc. v. Lalli*, FA 95284 (Nat. Arb. Forum Aug. 21, 2000) is misplaced. In all those cases the panels found evidence bad faith under Policy ¶4(b)(iv) where (i) the respondent operated a website confusingly similar to the complainant which (ii) directed Internet users to the respondent's website. Neither of those factors is present here. The Respondent offers websites which are *not* confusingly similar to the Complainant's website, and the Respondent's websites direct Internet users to the *Complainant's* website in accordance with Complainant's *explicit request* and for which the Complainant compensated the Respondent. Therefore, there is again no evidence of bad faith under Policy ¶4(b)(iv).

¹⁰ The Complainant has not alleged (and there is no reasonable basis for Complainant to allege) any bad faith under Policy ¶¶4(b)(i) and (ii). Therefore the Respondent does not address those factors.

Finally, the Complainant's allegation that the Respondent's use of a privacy registration service is evidence of bad faith is also baseless. As detailed in Section D above, use of a privacy service does not in and of itself constitute bad faith. See *HSBC Finance Corp. v. Clear Blue Sky Inc.*, D2007-0062 (WIPO June 4, 2007). Bad faith can only be inferred from the use of a privacy service where the Respondent is using the privacy service to evade. However, there is absolutely no evidence of evasion here and the Respondent's contact information is clearly accessible from every single webpage. See Annex 17.

Once again, ironically, the Complainant's argument for bad faith based on the Respondent's use of a privacy service demonstrates the Complainant's own bad faith. The Complainant itself uses a WhoIs domain privacy service for its domain name. See Annex 18. If Complainant believes its own argument regarding privacy services, then Complainant use of its own domain name is in bad faith as well. Therefore, either its argument regarding privacy services is in bad faith or its initiation of this entire proceeding is in bad faith.

The Respondent did not register or use the Disputed Domains for the purpose of disrupting anyone's business, including the Complainant's or for the purpose of luring the Complainant's users by creating a likelihood of confusion. In response to the Complainant's allegations under Policy ¶¶4(b)(iii) and (iv), the Disputed Domains were registered for the purpose of *promoting* the businesses of third parties, including the Complainant. As detailed above in Section C, the Respondent operated a *bona fide* service bolstered in part by an affiliate program which the Complainant itself created to benefit the Complainant. By the Complainant's very own allegations, the evidence only shows that the Respondent's activities have *benefitted* the Complainant by sending millions of users to the Complainant's website.

Because the Disputed Domains were not registered or used in bad faith, Policy ¶4(a)(iii) is not satisfied and the Complainant's requested remedy should be denied.

F. The Complainant Knew of, Fostered, Encouraged, Rewarded and Profited from the Respondent's Websites

Although the above facts make it clear that the Complainant cannot satisfy even one of the three requirements of Policy ¶4(a), a number of other facts paint a clear picture that the Complainant's Complaint was brought in bad faith.

Specifically, the Complainant would have the panel believe that the Respondent has operated the Disputed Domains for years without the Complainant's knowledge or consent and in contravention of the Complainant's rights in the Putative Mark. The facts could not be any further from the truth.

Even without reference to additional information, the fact that the Complainant paid the Respondent in excess of \$132,000 over a period of 20 months proves that the Complainant knew or should have known about the Respondent's use of the Disputed Domains. However, reliance on conjecture is unnecessary, as there is undeniable proof that the Complainant worked with and explicitly rewarded the Respondent for its work on behalf of the Complainant, even above and beyond the regular affiliate fees that it paid.

The ICQ chat logs show an explicit pursuit by the Complainant to enroll the Respondent in the Complainant's affiliate program. See Annex 15. In one of these conversations, the Complainant explicitly refers to at least one of the Disputed Domains as one of the Complainant's top referrers.¹¹ In another conversation, the Complainant requests that the Respondent fix a technical error stemming from one of the Disputed Domains.¹²

Moreover, during certain periods of the affiliation between the Complainant and the Respondent, the Respondent's websites were among the most popular referrers to the Complainant's websites. This data was proudly displayed by the Complainant on the affiliate program's website. For instance, during the month of June 2011, the Respondent's goldporntube.com was the single most effective referring domain to the Complainant's website, referring 1,785,398 unique visitors. See Annex 19, Affiliate Program Stats. Twelve out of the top 25 referring domains were the Disputed Domains. *Id.*

Notably, in July 2011, the Complainant implemented a contest for its affiliates under which the Complainant would award one iPads to each of three lottery winners. To receive lottery tickets, the affiliates needed to refer traffic to the Complainant; the more traffic they referred, the more tickets they would receive, and the better their chance of winning. See Annex 20, Affiliate Program Contest Rules. As explained above, the Respondent was one of the highest referring affiliates in this time period and therefore it won more lottery tickets than any other of the Complainant's affiliates. On the strength of its referring numbers, *the Respondent won the Complainant's contest, was awarded one of the iPads and was featured by name on the Complainant's website.* Annex 21, Affiliate Program Contest Winners.

It is therefore demonstrably untrue and disingenuous for the Complainant to allege that it had no knowledge of the Respondent's activities and that the Respondent's activities were in bad faith. If the Complainant's allegations were true, it would have never rewarded the Respondent for joining its affiliate program and bringing millions of users and hundreds of thousands of dollars worth of business to it.

G. The Complainant is Engaging in Reverse Domain Name Hijacking

On the basis of the foregoing, it is clear that the Complainant has brought its complaint in bad faith in an attempt at reverse domain name hijacking. Given the fact that the Complainant cannot satisfy even a single factor under Policy ¶4(a), much less all three, and given the additional ample evidence of bad faith as described above, the only possible purpose that the Complainant could have had to file its Complaint was to harass the Respondent and to attempt to deprive the Respondent of its legitimate interest in the Disputed Domains.

Accordingly, in accordance with Rule 15(e), the Respondent requests that the panel declare that the Complaint was brought in bad faith and constitutes an abuse of the administrative proceedings.

¹¹ ICQ Chat log from 16:02:23 15/06/2010, Annex 15.

¹² ICQ Chat logs from 11:07:13 15/02/2011 through 10:40:26 9/03/2011, Annex 15.

[4.] OTHER LEGAL PROCEEDINGS

As noted, the Respondent filed a petition for cancellation of the PORNTUBE trademark registration (U.S. Reg. No. 3,936,197) with the United States Patent and Trademark Office before the Trademark Trial and Appeal Board on April 10, 2013. The Respondent's petition for cancellation is attached to this Response as Annex 1 and is incorporated herein by reference.

Pursuant to Rule 18(a), Respondent, having been advised that a Panel has not been appointed, and that the Decision in this matter has not been published, hereby requests that, once a Panel has been appointed, the Administrative Proceedings be terminated, or in the alternative, suspended pending the outcome of the Petition for Cancellation.

Rule 5(b)(vi).

[5.] RESPONSE TRANSMISSION

The Respondent asserts that a copy of the Response, as prescribed by the FORUM's Supplemental Rules, has been sent or transmitted to the Complainant, in accordance with Rule 2(b). Rule 5(b)(vii); FORUM Supp. Rule 5.

[6.] The Respondent respectfully requests that the Administrative Panel deny the remedy requested by the Complainant.

[7.] CERTIFICATION

Respondent certifies that the information contained in this Response is to the best of Respondent's knowledge complete and accurate, that this Response is not being presented for any improper purpose, such as to harass, and that the assertions in this Response are warranted under these Rules and under applicable law, as it now exists or as it may be extended by a good-faith and reasonable argument.

Respectfully submitted,
Respondent Calista Enterprises Ltd.
By its Attorney,

/s/ Matthew Shayefar
Matthew Shayefar, Esq.
Val Gurvits, Esq.
Boston Law Group, PC

Date: May 2, 2013.

INDEX OF ANNEXES

<u>Annex #</u>	<u>Annex Title</u>
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2	Google Trends results as between “tube” and “youtube”
3	Google Search results for the term “porn tube”
4	Google Search results for the term “porntube”
5	Analysis of Alexa.com’s Top 1,000 Websites
6	Excerpts from XBiz.com
7	Google Trends results as between “porn” and “adult”
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9	Response to Office Action
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11	Google Search results for the names of the Respondent’s websites
12	WhoIs Record for AlexZ-Traffic.com
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ANNEX 1



United States Patent and Trademark Office

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<PXUWEP\WMPQIKDMEH\HQUFHLYHGE\WKH86372I
7KHIFROMMFI\PXUWEP\WMPQIKDMEH\HGEH2I
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ESTTA Tracking number: **ESTTA531542**Filing date: **04/10/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Calista Enterprises Ltd.		
Entity	Corporation	Citizenship	Republic of Seychelles
Address	Global Gateway 1749, Rue de la Perle Providence, Mahe Island, SEYCHELLES		

Attorney information	Sean Ploen Ploen Law Firm, PC 100 South Fifth Street, Suite 1900 Minneapolis, MN 55402 UNITED STATES sploen@ploen.com, bwold@ploen.com Phone:651-894-6800
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Registration Subject to Cancellation

Registration No	3936197	Registration date	03/29/2011
Registrant	Tenza Trading Ioanni Stylianou 6 2nd Floor, Flat 202 Nicosia, 2002 CYPRUS		

Goods/Services Subject to Cancellation

Class 041. First Use: 2005/05/00 First Use In Commerce: 2005/05/00

All goods and services in the class are cancelled, namely: Entertainment services, namely, providing a website featuring adult entertainment; Entertainment services, namely, providing a website featuring photographs, videos, related film clips, and other multimedia materials in the field of adult entertainment

Grounds for Cancellation

Genericness	Trademark Act section 23
The mark is merely descriptive	Trademark Act section 2(e)(1)

Attachments	Petition to Cancel PORNTUBE Registration.pdf (11 pages)(63298 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/s/ Sean Ploen
Name	Sean Ploen
Date	04/10/2013

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Registration No.: 3,936,197

For the mark: PORNTUBE

Date of Registration: March 29, 2011

_____)	
Calista Enterprises Ltd.)	
)	
Petitioner,)	
)	
v.)	Cancellation No.:
)	
Tenza Trading Ltd.)	
)	
Registrant.)	
_____)	

PETITION FOR CANCELLATION

Petitioner Calista Enterprises Ltd. (“**Petitioner**” or “**Calista**”), a Republic of Seychelles corporation having a business address at Global Gateway 1749, Rue de la Perle, Providence, Mahe Island, Seychelles, believes it has been and will be damaged by U.S. trademark registration no. 3,936,197 (the “**Registration**”) for the mark PORNTUBE (the “**Trademark**”), issued to Tenza Trading Ltd. (“**Respondent**” or “**Tenza Trading**”), a Cyprus corporation having a business address at Ioanni Stylianou 6, 2nd Floor, Flat 202, Nicosia 2002, Cyprus. Petitioner thus petitions to cancel the Registration. As grounds for cancellation, Petitioner alleges as follows:

I. STANDING

1. Petitioner provides adult entertainment services, including operating several Web sites that offer lists of, and links to, adult videos that are located on Web sites operated by third parties.

2. Petitioner's Web sites (the "**Sites**") sort the linked videos by subject matter category and by performer.

3. Petitioner's Sites also offer directories of and links to other adult video Web sites under headings such as "Top Rated Free Porn Sites" and "More Videos from Our Friends."

4. On Petitioner's Sites, a disclaimer of the following sort typically appears:

Disclaimer: RoyalPornTube.com is a fully automatic adult search engine focused on free porn tube clips. We do not own, produce or host the videos displayed on this website. All of the videos displayed on our site are hosted by websites that are not under our control. The linked videos are automatically gathered and added into our system by our spider script. Thumbnails are automatically generated from the videos. "Categories" is just a list of the most popular search queries entered by surfers. The list of related phrases is also based on surfers search queries.

RoyalPornTube.com has a zero-tolerance policy against illegal pornography. We take no responsibility for the content on any website which we link to. We take no responsibility for the phrases entered by surfers. Please contact us if you have found inappropriate content.

5. Petitioner earns revenue from the Sites in at least two ways: via advertisements displayed on the Sites, and by 'pay-for-traffic' referral arrangements for directing users of the Sites to the third-party Web sites where the indexed videos actually are hosted.

6. Several of the Sites operated by Petitioner are located at Uniform Resource Locators ("**URLs**") that contain the character string "porntube" – for instance, Petitioner's Sites are offered at the following URLs: <www.royalporntube.com>, <www.bonusporntube.com>, <www.bookporntube.com>, and <www.freshporntube.com>, among others.

7. On March 29, 2013, Petitioner received written notice from the National Arbitration Forum that Registrant had filed a Uniform Domain-Name Dispute-Resolution Policy complaint (the “**UDRP Complaint**”) against it, demanding that the registrations for approximately one dozen domain names¹ be transferred from Petitioner to Registrant.

8. Petitioner’s registered URLs that are the subjects of the UDRP Complaint all contain the character string “porntube.”

9. In support of the UDRP Complaint’s demand that certain URLs be transferred from Petitioner to Registrant, the UDRP Complaint cites the subject Registration and states that the Registration is prima facie evidence that the PORNTUBE mark is distinctive and capable of source identification.

10. In fact, the PORNTUBE designation that is the subject of the Registration is not capable of source identification and is not distinctive.

11. Petitioner has a valid and continuing interest in using the character string “porntube” in the URLs for its Sites and in the names of such Sites, including those Web sites complained of in the UDRP Complaint.

12. Petitioner, along with thousands of others in the adult entertainment industry, in the mainstream media, and in the community of Internet users, uses the terms “porn tube” and “porntube” as generic designations for Web sites that offer adult-themed video content.

13. Petitioner is a competitor of Registrant and is in a position to continue its use of the PORNTUBE designation in connection with services similar to those described in the Registration, and Petitioner thus possesses standing to challenge the validity of Registrant’s U.S. trademark registration for the term PORNTUBE.

¹ The caption of the UDRP Complaint lists twelve complained-of domains, but the body of the UDRP Complaint adds a thirteenth domain to the list of complained-of domains.

II. THE SUBJECT REGISTRATION

14. U.S. trademark application number 77/603111 for the mark PORNTUBE (shown in standard characters with no stylization or design element) was filed by an alleged predecessor-in-interest of Registrant on October 29, 2008. On March 29, 2011, registration no. 3,936,197 was issued to Registrant.

15. Registrant's U.S. trademark registration for the mark PORNTUBE claims protection for "Entertainment services, namely, providing a website featuring adult entertainment; Entertainment services, namely, providing a website featuring photographs, videos, related film clips, and other multimedia materials in the field of adult entertainment."

16. The subject Registration alleges that Registrant's predecessor-in-interest began its use of the PORNTUBE designation in commerce in the U.S. at least as early as May, 2005.

III. "PORN" AND "TUBE," GENERALLY

17. The mark shown in the Registration consists of the words PORN and TUBE combined into a single term, a fact suggested by the Patent and Trademark Office in issuing the November 6, 2008 "Notice of Pseudo Mark for Application Serial Number 77/603111," which assigned the phrase "PORN TUBE" as the pseudo mark for PORNTUBE.

18. The word "porn" is a common shortened form of the word "pornography."

19. The word "porn" either names or merely describes the adult entertainment services recited in the Registration.

20. The PTO commonly requires applicants to disclaim the exclusive right to use the word PORN from trademarks where the claimed goods or services concern pornography and adult entertainment, on the grounds that the word simply names or merely describes such services.

21. The word “tube” historically served as an informal or slang term for “television.”

22. In early 2005, the video-sharing Web site YouTube began operation; by the end of 2006, that site’s owner, YouTube, LLC had been purchased by Google Inc. for \$1.65 billion, and in the eight years since YouTube’s creation, the site has become the third-most-visited Web site in the U.S. and in the world, with more than one billion unique users visiting www.youtube.com each month. See Wikipedia: “YouTube,” <http://en.wikipedia.org/wiki/YouTube> (last visited Apr. 10, 2013); YouTube: “Statistics,” <http://www.youtube.com/yt/press/statistics.html> (last visited Apr. 10, 2013).

23. The speed with which the YouTube Web site gained popularity for video-sharing services, and the rapidity with which the YOUTUBE trademark entered the public consciousness, led adult entertainment Web sites to adopt the words YOU and TUBE for use in the names of Web sites devoted to providing pornographic videos; as one journalistic account relates:

It was inevitable, once YouTube launched in 2005, that someone would start a porn equivalent. Sure enough, over two months in the summer of 2006, three different sites launched that would become major adult-only tubes: PornoTube, RedTube, and YouPorn. Like YouTube, the porn tubes were flooded with free content -- some of it licensed for pennies from older companies that didn’t understand the web, much of it pirated from paid sites. The tubes had a new business model: They made most of their money by keeping surfers on their sites and selling banner ads, though they also put some content behind a paywall.

Benjamin Wallace, *The Geek-Kings of Smut*, NEW YORK, Jan. 30, 2011, <http://nymag.com/news/features/70985/>.

24. The word “tube” either names or merely describes a Web site where videos are made available.

25. Although registry practice necessarily lags public usage of the word “tube” in this manner, the PTO has begun requiring applicants to disclaim the exclusive right to use the word TUBE from trademarks where the claimed goods or services concern Internet-based video services, on the grounds that the word simply names or merely describes such services.

IV. USE OF THE TERMS “PORN TUBE” AND “PORNTUBE” IS COMMONPLACE

26. The terms “porn tube” and “porntube” have come into widespread and common use to name and to describe Web sites such as those operated by Registrant and Petitioner.

27. For example, such usage occurs within the medical and scientific community, including within an article discussing the subject “Are Porn Tube Sites Causing Erectile Dysfunction?” Posting of Gary Wilson to PSYCHOLOGY TODAY, CUPID’S POISONED ARROW blog, <http://www.psychologytoday.com/blog/cupids-poisoned-arrow/201301/are-porn-tube-sites-causing-erectile-dysfunction> (Jan. 16, 2013).

28. Such usage also occurs within mainstream journalism:

Whether harmful or not, YouTube’s success has unsurprisingly led to imitations. Among them are the hugely popular “porn-tube” websites like youporn.com, xvideos.com and pornhub.com. These aggregate short clips of both amateur and commercial pornography, posted by the site’s users. Like YouTube, a tremendous amount of content is made available for free. But there are important differences between YouTube and porn-tube[s], beyond the fact that the people featured on the porn-tube sites are naked.

Kal Raustiala and Chris Sprigman, *Copyright Infringements in the Porn Industry*, THE NEW YORK TIMES, FREAKONOMICS blog, May 5, 2010, <http://www.freakonomics.com/2010/05/05/copyrighting-porn-a-guest-post/>.

29. Such usage occurs within technology journalism, *e.g.*:

The company was started by German programmer Fabian Thylmann, who capitalized early on the trend towards free porn “tube” sites—the x-rated YouTube clones—by buying up big tube sites like xTube and Pornhub.

Adrian Chen, *The King of Porn Gossip: Meet Mike South, the Man Who Got to the Bottom of The Industry’s Syphilis Outbreak*, GAWKER blog, Sept. 28, 2012,

<http://gawker.com/5946695/the-king-of-porn-gossip-meet-mike-south-the-man-who-got-to-the-bottom-of-the-industrys-syphilis-outbreak>.

30. Courts, too, have adopted this parlance:

A “tube site” is a website that collects videos from other sites, either with or without permission, and rebroadcasts them. Youtube.com, for example, is a lawful and popular Internet video hosting tube site found at www.youtube.com. [...] The [Defendants’] website vinigay.com is a tube site whose primary, if not all, works contain copyrighted pornographic films which were likely unlawfully downloaded from various adult-entertainment pay sites, including Plaintiff’s, then unlawfully uploaded and redistributed through tube sites for free, usually resulting in a profit of the tube owner via referral fees.

Liberty Media Holdings, LLC v. Vinigay.com, 2011 WL 7430062 (D. Ariz. Dec. 28, 2011); *report and recommendation adopted*, 2012 WL 641579 (D. Ariz. Feb. 28, 2012) (citations omitted).

31. Financial journalists, too, adopt this usage:

“Tube sites” -- adult content Web sites that mimic YouTube in hosting everything from professionally made videos to user-generated clips -- have quickly risen in popularity since they came onto the scene a few years ago, and rank among the highest traffic-getters globally. Some, like Youporn and Pornhub, attract more views than the Web sites of *The New York Times* or Apple. But like YouTube and other video-sharing sites, tube porn sites have struggled with profitability and piracy.

Oliver J. Chiang, *The Challenge of User-Generated Porn*, FORBES.COM, Aug. 5, 2009, <http://www.forbes.com/2009/08/04/digital-playground-video-technology-e-gang-09-ali-joone.html>.

32. College newspapers also use the term generically; *e.g.*,

According to *Forbes*, the most visited online porn video websites are “tube” websites such as YouPorn, which offers a sexy 61 categories ranging from the mild “instructional” to the wild “fetish.” Porn tubes work essentially like YouTube: They provide streaming content and rely on user-generated uploads.

Elyana Barrera, *Porn Tubes Fight SOPA*, THE DAILY TEXAN, Jan. 24, 2012, <http://dailytexanonline.com/life-and-arts/2012/01/24/porn-tubes-fight-sopa>.

33. The owners and operators of pornographic video Web sites commonly refer to their sites as “porn tubes.”

34. Visitors to and viewers of pornographic video Web sites commonly refer to such sites as “porn tubes.”

35. The degree to which use of this term has become commonplace is indicated by the fact that a search for the phrase “porn tube” on the Google search engine turns up approximately 129 million results.

V. COMBINING TWO GENERIC OR DESCRIPTIVE WORDS DOES NOT CREATE A DISTINCTIVE TERM

36. Most usage of the term “porn tube” occurs in just that manner, *i.e.*, as a two-word phrase.

37. Registrant’s combination of the words “porn” and “tube” into the designation PORNTUBE, however, is insufficient to render that term capable of source-identifying significance. *See In re ING Direct Bancorp*, 100 USPQ2d 1681 (TTAB 2011) (“Applicant’s deletion of spaces or hyphens within the designation ‘Person2Person’ cannot transform clearly

generic terms such as ‘Person 2 Person Payment’ or ‘Person-2-Person Payment’ into something that is capable of functioning as a source identifier,” citing *In re 3Com Corp.*, 56 USPQ2d 1060, 1061 (TTAB 2000)).

VI. REGISTRANT’S KNOWLEDGE OF AND ACQUIESCENCE TO PETITIONER’S USE OF “PORNTUBE”

38. On information and belief, until late 2012, Registrant engaged in few, if any, attempts to enforce trademark rights in the term PORNTUBE.

39. Registrant has known of Petitioner’s use of the character string “porntube” in the URLs for Petitioner’s Sites for years and has provided incentives to Petitioner to refer Internet user traffic to Registrant’s Web site.

40. For instance, Registrant has for several years paid referral fees to Petitioner for directing Internet users from Petitioner’s Sites – including multiple sites incorporating the character string “porntube” in their URLs -- to Registrant’s own Web site.

41. Registrant has for years possessed actual knowledge that Petitioner and others make use of the character string “porntube” or close variants (*e.g.*, “pornotube”) in URLs and Web site names, and has either explicitly or implicitly acquiesced to such usage.

42. In light of the foregoing facts, consumers of video pornography Web sites do not view the terms “porn tube” or “porntube” as indicators of source but instead as the generic name for, or as terms simply describing, Web sites which make video pornography available for viewing.

VII. CLAIMS FOR RELIEF

43. **Genericness.** Petitioner thus requests cancellation of the subject Registration on grounds that the designation shown therein, PORNTUBE, does not possess source-identifying capacity and lacks all distinctiveness with regard to the services recited in the subject

registration, due to the term PORNTUBE having become substantially synonymous with such services amongst the consuming public and within Registrant's industry.

44. **Lack of Acquired Distinctiveness.** In the alternative, Petitioner requests cancellation of the subject Registration on grounds that the designation PORNTUBE merely describes Registrant's services and has not in fact acquired distinctiveness as a source indicator for Registrant within the requirements of the Lanham Act, 15 U.S.C. § 1052(f).

WHEREFORE, Petitioner respectfully requests that the Trademark Trial and Appeal Board sustain this Petition for Cancellation and:

- (i) cancel U.S trademark registration no. 3,936,197 on grounds that the PORNTUBE designation shown therein is generic or is merely descriptive when used in connection with the services recited therein; and,
- (ii) award Petitioner any further relief the Board deems equitable.

DATED: April 10, 2012

PLOEN LAW FIRM, PC

/s/ Sean Ploen

Sean Ploen

100 South Fifth Street, Suite 1900

Minneapolis, MN 55402

Tel.: (651) 894-6800

Fax: (651) 894-6801

E-mail: sploen@ploen.com

Attorney for Calista Enterprises Ltd.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **PETITION FOR CANCELLATION** was mailed via First Class mail to Registrant and its attorney of record on this 10th day of April, 2013 at the following addresses:

Anna M. Vradenburgh, Esq.
The Eclipse Group LLP
6345 Balboa Boulevard
Suite 325, Building II
Encino, CA 91316

and

Tenza Trading Ltd.
Ioanni Stylianou 6
2nd Floor, Flat 202
Nicosia 2002
CYPRUS

/s/ Sean Ploen

Sean Ploen

ANNEX 2

+You Search Images Maps Play YouTube News Gmail Drive Calendar More ▾



Sign in

Trends

Web Search Interest: **tube, youtube**. Worldwide, 2004 - present.



Explore trends

Hot searches

Search terms

- ×
- ×
- [+ Add term](#)
- [Other comparisons](#)

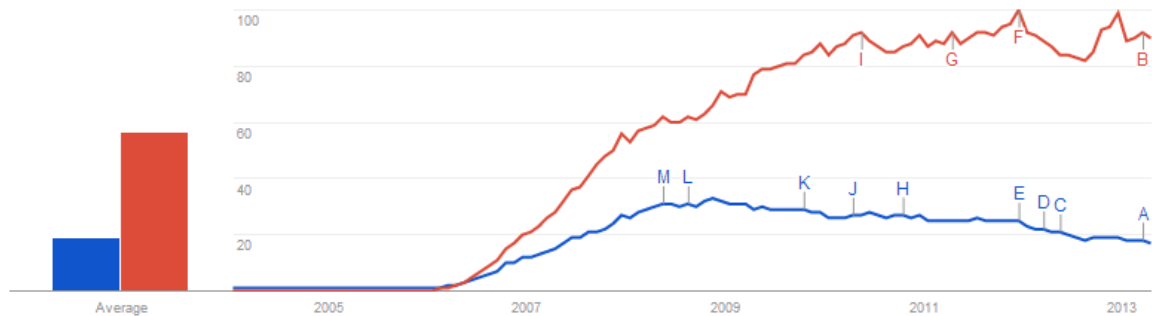
Limit to

-
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Interest over time

The number 100 represents the peak search interest

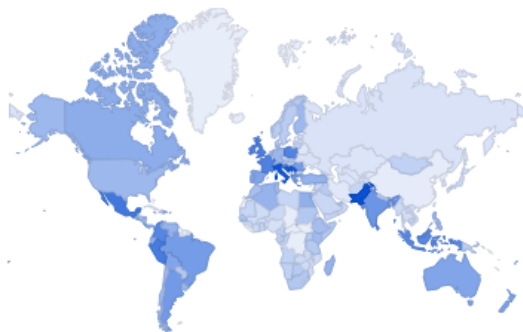
☒ News headlines ☐ Forecast



Embed

tube **youtube**

Regional interest



0 100

Region | City

[View change over time](#)

Embed

Related terms

you	100	
you tube	100	
youtube	5	
u tube	5	
you tube video	0	
you tube videos	0	
tube galore	0	

Embed

ANNEX 3

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porn tube



Sign in

Web Images Maps Shopping More ▾ Search tools



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Teen - Top Rated - Mobile Porn, Free Mobile Porn ... - Milfs

[PornTube™ - Free Porn Movies](#)[www.porntube.com/](#)Watch 1000's of FREE porn videos at **PornTube.com** with dozens of new videos added daily. Search by Pornstar or Browse by Anal, Asian, MILF, Lesbian, ...[Categories](#) - [Videos](#) - [Pornstars](#) - [Channels](#)[YouPorn: Porn Videos, Sex, XXX, Free Porn Tube](#)[www.youporn.com/](#)YOUPORN is your home for XXX & Free **PORN** videos. WATCH the best TEEN sex on the net! Enjoy the sexiest **PORN** with the hottest naked girls in our videos.

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[PornoTube.XXX - Porno Tube, Porn Tube, Free Porn Tube](#)www.pornotube.xxx/

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ANNEX 5

DECLARATION OF MATTHEW SHAYEFAR

I, Matthew Shayefar, declare as follows:

1. I am an attorney for Calista Enterprises Ltd., the Respondent in *Tenza Trading Ltd. v. Calista Enterprises Ltd.*, FA1303001491515 (Nat. Arb. Forum).

2. On April 10, 2013, I downloaded Alexa's top 1,000,000 sites list from <http://www.alexa.com/topsites>.

3. I documented every porn tube listed in the top 1,000 websites in Alexa's list onto the attached document with their respective rankings on that list.

4. For each website documented, I also searched the webpage itself to determine whether the website used the term "porn tube" to describe itself, which I then documented in the attached.

5. For each website documented, I also consulted the Google Search results for "porn tube" and documented whether the listed website was listed as a result on the first three pages of that Google Search.

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, declares that all statements made of my own knowledge are true and all statements made on information and belief are believed to be true.

/s/ Matthew Shayefar
Matthew Shayefar

Dated May 1, 2013

Porn Tube	Alexa Ranking	Described as "porn tube"	Page on Google Search for "porn tube"
xvideos.com	35		
xhamster.com	45		
pornhub.com	63	Yes	1
redtube.com	77		1
xnxx.com	96	Yes	3
youporn.com	100	Yes	1
Tube8.com	130	Yes	1
hardsextube.com	222		
youjizz.com	240	Yes	1
drtuber.com	336	Yes	
yourlust.com	347	Yes	
beeg.com	367		
bravotube.com	436	Yes	3
largeporntube.com	459	Yes	1
spankwire.com	547	Yes	2
nudevista.com	584		
alphaporno.com	585	Yes	3
keezmovies.com	609	Yes	1
perfectgirls.net	645		
porn.com	652	Yes	
pornerbros.com	664	Yes	
sunporno.com	675	Yes	
porntube.com	676	Yes	1
4tube.com	680		
video-one.com	693	Yes	
ixxx.com	720	Yes	
xtube.com	726	Yes	1
videosexarchive.com	766	Yes	
h2porn.com	767		
hellporno.com	789	Yes	
tnaflix.com	909		2
slutload.com	988		

Based on data collected from
Alexa on April 10, 2013.

Number of porn tubes in Top 1000	32
Number of porn tubes using "porn tube" descriptor	21
Percentage using "porn tube"	65.62%
Number of porn tubes showing up in 3 pages of Google search	14
Percentage showing up in 3 pages of Google search	43.75%

ANNEX 6

Adult Industry News Search - XBIZ.com

http://www.xbiz.com/search/?news=1&articles=1&st=1&sa=1&sb=1&t=exact&q=porn+tub

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Adult Industry News Search

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News Results

Porn4You.net Is Now Live
Thursday, February 28, 2013
Porn4You.net is now live.

Porn4me.net to Launch Soon
Monday, February 18, 2013
A new free porn site called Porn4Me.net will be launched soon.

Video: U.K. Porn Biz Adapting With More Live Cams, BBC Reports
Thursday, October 25, 2012
The adult live cam market is burgeoning in the U.K. with nearly 5,000 performers plying their trade, according to the Adult Industry Trade Association in an article published today.

Kink.com Files Suit Against Tube Site DrTuber.com
Monday, April 16, 2012
Kink.com today filed a multimillion-dollar copyright and trademark infringement suit against the operator of DrTuber.com, a porn tube site that is alleged to have made available 75 Kink movies on its site.

PuffyChicks Launches New BBW Contest
Friday, March 9, 2012
PuffyChicks.com, a blog for BBW fans, is holding a video contest starting this week.

DancingBear Takes Over Tube Site FapZap
Wednesday, October 19, 2011
In an apparent settlement of a case that levied copyright infringement claims, short-lived tube site FapZap.com has been taken over by the operators of DancingBear.com.

Private Targets Tube Sites SunPorno, TubeRip
Monday, August 29, 2011
Private Media Group on Monday filed copyright suits against a pair of tube sites, SunPorno.com and TubeRip.com.

\$11.3M Default Judgment Against Tube Sites Set Aside
Tuesday, July 12, 2011
A federal judge today set aside Private Media Group's motion for a \$11.3 million default judgment against two of the largest porn tube sites, EmpFlix.com and TnAFlix.com.

Article Results

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http://www.xbiz.com/news/news_piece.php?id=160082&mi=all&q=porn+tube

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Porn4You.net Is Now Live

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Thursday, Feb 28, 2013 Text size: [+](#) [-](#)

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LOS ANGELES — Porn4You.net is now live.

"This website was built on the idea that people turn to **porn** sites to live out fantasies and experiences they wouldn't otherwise be able to," the company said.

"Porn4Me.net has something in store that will excite even the most obscure of tastes. The site truly has something for everyone. With many exciting features on the way in the coming weeks, there are so many reasons to bookmark this site today. We have all thought about increasing our stimulation in various ways while watching **porn**. One of those ways is by enjoying multiple videos at a time, however this is rarely a feature offered on most free **porn** tubes. Many of us will never have a chance to watch dozens of beautiful girls have sex at the same time, at least not in real life. That is where the porngrid comes in. You can now stream multiple videos at the same time without having to load up multiple players and pages."

The company said streaming multiple HD **porn** videos at the same time is like being in the middle of a sex orgy.

Porn4Me.net offers HD videos, **porn** wallpapers and photos of pornstars.

For a limited time, users can download a free **porn** wallpaper for sharing and liking the page.

More information about Porn4me.net can be found at the website [here](#).

[XBIZ™](#) [Twitter](#) [Facebook](#) [Email](#) [Mobile](#)

XBIZ Research

What impact will 3D virtual worlds have on the adult industry?

Great impact, much of industry commerce will take place within them
20.47%

Limited impact, they'll have niche appeal only
65.35%

I don't know
14.17%

Out of 127 votes. Results based on votes submitted by members of XBIZ.net social network.



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1P http://www.xbiz.com/news/news_piece.php?id=159615&mi=all&q=porn+tube

Porn4me.net to Launch Soon - ...



XBIZ.COM Industry News Network

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AFFILIATE PROGRAM
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Porn4me.net to Launch Soon

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LOS ANGELES — A new free porn site called Porn4Me.net will be launched soon.

It will feature adult performers in high quality HD porn videos. It also allows fans to stream multiple videos at once.

"We've got the hottest girls and the best free porn on the web," the site said. "Finally there will be a porn tube with all of the hardcore sex that you have been looking for. It may even have something new that gets you off like never before. If you have been looking for something not offered on the other porn tube sites, look no further."

More information about Porn4me.net can be found [here](#).



XBIZ Research

What impact will 3D virtual worlds have on the adult industry?

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65.35%

I don't know

14.17%

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XBIZ NEWS REPORT

By Rhett Pardon
Thursday, Oct 25, 2012 Text size: + -

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11 October 2012 LAST UPDATED AT 16:56

Women getting into webcam industry for 'wrong reasons'

Newsbeat talks to Amanda about the rise of webcam operators and the state of the porn industry.

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LONDON — The adult live cam market is burgeoning in the U.K. with nearly 5,000 performers plying their trade, according to the Adult Industry Trade Association in an [article](#) published today.

AITA's Tom Dennis, an adult entertainment producer in the U.K., said that the meteoric rise of the adult live cam biz in the U.K. is in direct response to plummeting sales of DVDs due to the proliferation of free [porn tube sites](#) and rampant piracy.

"Less work comes around because people aren't supporting the [porn](#) industry," Dennis told the BBC in the article, which is accompanied by a video. "They'd rather watch their [porn](#) for free then pay for it."

Dennis, however, said that the live cam biz has some key advantages and has righted a sinking industry here in the U.K.

"It's live and cannot be pirated," Dennis said. "It means that performers can directly get paid from their online performances."

The BBC article went on to discuss ATVOD's role in regulating [porn](#) and its frustration dealing with hardcore content from overseas websites.

ATVOD, the U.K. regulatory czar for video-on-demand, requires websites to keep pornographic images out of reach of those under 18. But those regulations under Rule 11 do not for those sites operated overseas.

Today's article also puts a spotlight on Amanda, a performer who uses live cams as her main source of income.

"I think it's going to take over to be fair, the webcamming side of stuff," she said.

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News For The Media

Kink.com Files Suit Against Tube Site DrTuber.com - XBIZ.com

http://www.xbiz.com/news/news_piece.php?id=147198&mi=all&q=porn+tube

Kink.com Files Suit Against Tub...

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News For The Media

NEWS STORY

Kink.com Files Suit Against Tube Site DrTuber.com

XBIZ NEWS REPORT

By Rhett Pardon

Monday, Apr 16, 2012 Text size: + -

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MIAMI — Kink.com today filed a multimillion-dollar copyright and trademark infringement suit against the operator of DrTuber.com, a **porn tube** site that is alleged to have made available 75 Kink movies on its site.

Kink.com said DrTuber allegedly poached and streamed such working titles as "12789_Asphyxia_James," "13810_skin," "12345_kiki_chloe" and "11815_lorelei_lily."

Kink produces numerous BDSM and fetish brand such as Hogtied, Public Disgrace and The Upper Floor.

"As of the date of this complaint, a total of 75 instances of infringement, identified by name and registration number ... were documented as being displayed and distributed on DrTuber.com," the suit said.

The filing at U.S. District Court in Miami is the second infringement suit against Igor Kovalchuk and his related companies.

Last month, a federal rejected Private Media Group's copyright infringement suit against Kovalchuk who, through DrTuber, was alleged to have streamed 31 of its videos. Private was asking for \$4.65 million in damages, as well as attorneys fees and court costs.

But a federal judge dismissed the suit after ruling that Private hasn't "sufficient minimum contacts with Iowa to satisfy due process and permit the exercise of personal jurisdiction over him." Private hasn't yet said whether it is appealing that verdict.

Kink.com, in a release, said it is asking in excess of \$10 million in the suit filed today. The suit names DrTuber.com and Igor Kovalchuk, as well as Extron Worldwide Corp. and Era Technologies Ltd.

"We will not sit still while others illegally steal and profit from our work," Kink.com founder and CEO Peter Acworth said in a statement. "We will protect our work, we will protect our brands, and we will certainly protect our affiliates."

KINK.COM
DrTuber
DRTUBER.COM

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XBIZ Research

What impact will 3D virtual worlds have on the adult industry?

Great impact, much of industry commerce will take place within them
20.47%

Limited impact, they'll have niche appeal only
65.35%

I don't know
14.17%

Out of 127 votes. Results based on votes submitted by members of XBIZ.net social network.

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PuffyChicks Launches New BBW Contest - XBIZ.com

http://www.xbiz.com/news/news_piece.php?id=145384&mi=all&q=porn+tube

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PuffyChicks Launches New BBW Contest

COMPANY PRESS

Friday, Mar 9, 2012 Text size: + -

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LOS ANGELES — PuffyChicks.com, a blog for BBW fans, is holding a video contest starting this week.

Sponsored by Plumper Pass and ChubbyGirls.TV, the contest is open to all plus size and BBW girls over 18 years old. Amateurs, cam models and **porn** performers are all encouraged to apply.

"Last summer, we did the 'Puffy Fun in the Sun' contest, and almost 10,000 total votes were cast," PuffyChicks owner Sam Rockhard said.

"Our contests have always been successful and this one should be even better — since it's a video contest, it will allow the girls to get really creative. Plus, we have some great prizes, so we should get a lot of contestants vying to win and bringing their fans to the site to vote."

To enter, girls must submit a two-minute (or longer) video clip, where they answer a list of 10 questions dealing with such topics as their comfort level with their bodies and exploring sexual fantasies and fetishes.

A complete list of questions and rules is posted to the site at [PuffyChicks.com](#).

All videos will be posted on [ChubbyGirls.TV](#), an all **BBW porn tube** site.

Videos will be posted to the site as soon as they are received.

Fan voting starts April 16 and closes April 30. Fans can vote once every 24 hours for their top three video clips on the site.

Winners will receive various prizes, including shopping passes to the three girls with the most votes.

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DancingBear Takes Over Tube Site FapZap - XBIZ.com

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NEWS STORY

DancingBear Takes Over Tube Site FapZap

XBIZ NEWS REPORT

By Rhett Pardon
Wednesday, Oct 19, 2011 Text size: + -

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MIAMI — In an apparent settlement of a case that levied copyright infringement claims, short-lived tube site [FapZap.com](#) has been taken over by the operators of [DancingBear.com](#).

GRHK LLC, operators of DancingBear, had been seeking the identities of FapZap's operators in a letter to its hosting service Choopa and filed with the federal court in Miami.

In the letter to Choopa in August, GRHK said that it had become aware of 18 videos on FapZap that were poached and streamed on the tube site, including such titles as "Dancing Bear — Crazy Party Girls," "Dancing Bear — Fucking in the Club" and "Dancing Bear — Dick Dick Goose."

"[W]e request that Choopa remove or disable access to the attached claimed infringing material as soon as practical after receipt of this notification," the letter said.

Two days after serving Choopa with the letter, the case against FapZap was terminated and now FapZap.com redirects to DancingBear.com.

On Wednesday, the attorney of record for GRHK in the claim, Marc Randazza, would not confirm nor deny terms of an apparent settlement to XBIZ.

FapZap, according to archived pages, claimed to be "one of the world's largest free porn tube resources"; it currently ranks No. 22,371 on Alexa. The site had been operable as a tube site for less than a year, and it is unclear who owned the site.

DancingBear, also known as "Tale of the Dancing Bear," features stripping bachelorette party sex; its Alexa ranking is No. 3,202.








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Private Targets Tube Sites SunPorno, TubeRip - XBIZ.com

1P http://www.xbiz.com/news/news_piece.php?id=138015&mi=all&q=porn+tube

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BEFORE I MADE THE SWITCH, GIRLS USED MY PENIS WAS SMALL. NOW THEY ASK ME FEET WHEN ITS OUT SO THAT I DON'T

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Private Targets Tube Sites SunPorno, TubeRip

XBIZ NEWS REPORT

By Rhett Pardon

Monday, Aug 29, 2011 Text size: + -

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CEDAR RAPIDS, Iowa — Private Media Group on Monday filed copyright suits against a pair of tube sites.

SunPorno.com, which has an Alexa ranking of 923, and TubeRip.com, which ranks lower at 4,095, were each hit with federal copyright suits, seeking millions in damages.

TubeRip, Private contends, has poached and streamed 51 of its videos, while SunPorno has streamed 39 Private videos, according to the complaints, both filed at U.S. District Court in Cedar Rapids, Iowa.

According to court filings, SunPorno is operated by Sergej Letayagin of Gibraltar and TubeRip is owned by Joe Olivero of Toronto. The sites each use Moniker privacy shield services.

Both suits follow Private's boilerplate template when suing adult tube sites, claiming that surfers "initially lead to believe that defendant's website is a completely free viewing site," and then are "presented with paid options to enhance the viewing experience of unauthorized works owned by plaintiff."

Each of the suits name 100 John Doe companies, presumably the tube sites' advertising business partners, as well 100 John Does.

Private, through its Fraserside IP division, now has sued 12 porn tube sites in the past year.

ENTERTAIN YOURSELF **SUN PORN** **TUBE RIP**

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\$11.3M Default Judgment Against Tube Sites Set Aside - XBIZ.com

http://www.xbiz.com/news/news_piece.php?id=136163&mi=all&q=porn+tube

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NEWS STORY

\$11.3M Default Judgment Against Tube Sites Set Aside

XBIZ NEWS REPORT

By Rhett Pardon
Tuesday, Jul 12, 2011 Text size: + -

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CEDAR RAPIDS, Iowa — A federal judge today set aside Private Media Group's motion for a \$11.3 million default judgment against two of the largest porn tube sites, EmpFlix.com and TnAFlix.com.

U.S. Judge Mark Bennett ruled that while the websites' operator, Youngtek Solutions Ltd., failed to timely respond to Private's complaint, it was not intentional because the company was served in Cyprus and none of its management is located there.

Bennett further decided that Youngtek has various potential meritorious defenses to Private's claims, including that it lacks personal jurisdiction in Iowa, where the suit was filed, and that it maintains a DMCA agent for service of takedown notices for possible infringing material.

Private, in its original suit filed in February, claims YoungTek illegally streamed 75 of its videos on EmpFlix.com, which attracts 1.5 million surfers a day, and TnAFlix.com, which attracts 3 million daily.

It further said that YoungTek generates "annual revenue estimated in tens of millions of dollars."

The suit also names John Does, as well as 100 John Doe companies, presumably YoungTek's business partners or advertisers. It seeks \$150,000 for each alleged infringement, as well as an injunction among other forms of relief.

Private's attorney, Chad Belville, also is seeking to have EmpFlix.com and TnAFlix.com's domain names awarded to the Barcelona-based adult entertainment giant.

"The amount at stake is large, but the defendant is a commercial venture that operates one of the busiest online commercial properties in the world," Private said in an earlier motion for default judgment. "Only a large award will serve to deter these arrogant defendants from future illegal action."

But Bennett on Tuesday decided that Private's default motion should be upheld, saying that Private "does not argue that it would be prejudiced in any concrete way by setting aside the default entry."

PRIVATE
MEDIA GROUP INC.

VS.



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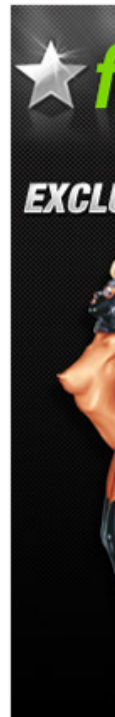
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ANNEX 7

Trends

Web Search Interest: **porn, adult**. Worldwide, 2004 - present.

Explore trends

Hot searches

Search terms ?

× **porn**× **adult**

+ Add term

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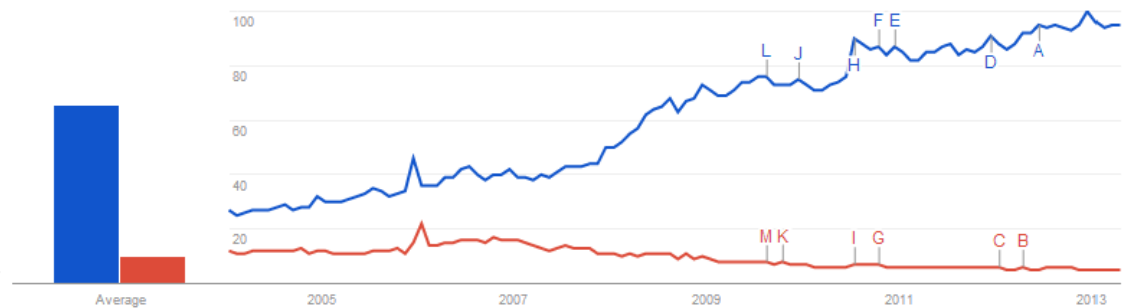
Worldwide ▶

2004 - present ▶

All Categories ▶

Interest over time ?

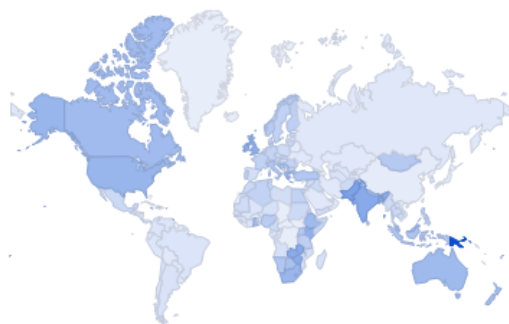
The number 100 represents the peak search interest

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porn adult

Regional interest ?



▶ View change over time ?

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Related terms ?

Top Rising

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you porn	35	<div></div>
porn hub	30	<div></div>
porn sex	30	<div></div>
sex	25	<div></div>
tube porn	25	<div></div>
porn videos	25	<div></div>
video porn	20	<div></div>
porn movies	15	<div></div>
gay porn	15	<div></div>

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ANNEX 8

